KASIRIN KASMANI

v.

THE OFFICIAL ADMINISTRATOR & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CIVIL SUIT NO. 23-19 OF 1990]
25 JULY 1991

DAMAGES: *Absence of receipts - Wife's transport and living expenses - Purchase of 3 wheelchairs in his lifetime - Modification of wheelchair - Urinary condoms - Nursing care - Loss of earnings - Fractures of 2nd lumbar vertebra - Complete paralysis of both lower limbs - Incontinence of bladder and bowels - Wheelchair ridden - Urinary bladder infections - Pressure sores - Contracture deformities - Inability to fulfil marital obligations.*

TORT: *Whether plaintiff should have taken evasive action to move his tanker to the side-table - Centre line is guide only - Duty owed - Contributory negligence*

A collision occurred between a tanker driven by the plaintiff and motor car driven by the defendant travelling in opposite directions. The defendant died as a result of the accident. The evidence indicated that the collision occurred on the plaintiff's side of the road. The plaintiff became completely paralysed from the waist down.

Held:

[1] There is no evidence that the plaintiff deliberately hogged his side of the road in the face of oncoming danger. Had the plaintiff reacted by swerving to the side-table on his left as a normal driver would have done the collision perhaps would not have ended in the way that it did resulting in the severe injuries to himself and in the death of the driver of the car.

[2] Although it was obvious that the deceased defendant had to have been travelling at a great speed there was a duty on the part of the plaintiff to have attempted to ensure safety for himself by taking evasive action by steering his tanker into the side-table on his left away from the path of the oncoming car unless he himself was driving at a speed far greater than 50 to 60 kilometres per hour, the speed at which he said he was travelling just before the collision. In the circumstances, liability was apportioned against the deceased driver at 80% and against the plaintiff 20%.

[Order accordingly.]

Cases referred to:

Goh Beng Seng v. Dol Bin Dolah [1970] 2 MLJ 95 ***(cons)***
Lian Ann Lorry Transport & Forwarding Sdn. Bhd. v. Govindasamy [1982] CLJ (Rep) 173 ***(cit)***
Teoh Suan Eng v. Lew Meng Shin & Anor. [1982] CLJ (Rep) 810 ***(cit)***
Abdul Munir bin Hj Abdul Rahman v. Mohamed Adzha bin Hassan [1985] 2 MLJ cl ***(cit)***
Lee Ann (f) v. Mohd. Sahari bin Zakaria [1986] CLJ (Rep) 432 ***(cit)***
Ng Kah Heng v. Ng Pek Choo [1989] 2 CLJ (Rep) 170 ***(cit)***

For the plaintiff - N. Jegatheeson; M/s. John Ang & Jega
For the defendants - A.S. Sidhu; M/s. G.T.S. & Americk Sidhu

JUDGMENT

LC Vohrah J:

This is a claim for damages arising out of a motor accident on 31 May 1989 along the Johore Bahru/Air Hitam trunk road. Some time after noon on that day the plaintiff was driving a tanker No. BBH 6816 carrying palm oil along this road in the direction of Johore Bahru. Behind his tanker heading in the same direction was another tanker No. JAE 6520 also carrying palm oil driven by PW2. Both tankers were travelling at about 60 kilometres per hour and when they reached the 27 milestone a Honda car No. WBM 503 coming from the opposite direction overtook a lorry in front of it and collided into the plaintiff's tanker and then into PW2's tanker resulting in both the tankers being overturned as shown in the photographs at ABD11-12.

According to the plaintiff just before the accident he saw two lorries, one smaller than the other, approaching him from the opposite direction. The smaller lorry which was behind the larger lorry overtook it and re-entered its correct side of the road. When he saw this overtaking he had applied his brakes but at that point of time the car shot out from behind the larger lorry and attempted to overtake it. He showed by means of toy models that whilst the car was attempting to pass the lorry on its correct side of the road it collided into the front portion of his tanker when the tanker was wholly on its correct side of the road. He had decreased his speed from 60 kilometres per hour to 55 kilometres when he saw the smaller lorry approaching the larger one in front of it but he still had no way of avoiding the collision with the car. After the collision his tanker was overturned and he was thrown out of the cabin and he lost consciousness.

PW2's story corroborated the version given by the plaintiff as to how the accident occurred. He stated that the collision occurred on a straight, level stretch of road and he saw the accident clearly as he had been following the plaintiff's tanker for about 10 miles at a distance of about 60 feet just before the event. The car whilst overtaking the lorry collided into the plaintiff's tanker which overturned and then collided into the offside front of his tanker thereby deflating the offside tyre and breaking a spring attached to the axle in front. He applied his brakes but still to no avail. When he first saw the car overtaking the lorry, the car was 110 to 120 feet in front of his tanker.

The defence called no witnesses and Counsel for the defendants conceded that the driver of the car was negligent but contended that the plaintiff was guilty of contributory negligence by failing to swerve to his left to the side-table and that the plaintiff must have been travelling at great speed endangering his own safety. He cited the case of *Goh Beng Seng v. Dol Bin Dolah* [1970] 2 MLJ 95 wherein Sharma J had this to say (at p. 97):

> There can be no territorial or geometrical division of the road. The center line remains a guide and a reminder only. One's duty is to ensure safety for oneself and for others. The attitude of mind that because the driver coming from the opposite direction is encroaching a few inches of my side of the road, I can treat him as a trespasser and proceed on my half of the road as if it was my exclusive domain and that I am totally immune from liability if I drive within the exact limits of that "realm" even though I know that an accident may thereby happen on my side of the road, is the attitude of an irresponsible and an irrational being. I owe a duty to others on the road just as others owe a duty to me.

There is no evidence that the plaintiff deliberately hogged his side of the road in the face of oncoming danger. It is clear from the sketch-plan P1 tendered by the investigating officer PW1 that the collision took place on the plaintiff's correct side of the road where all the

glass pieces were found very near the center white line. It is also clear that on each side of this trunk road there was a side-table 9 feet wide. Had the plaintiff reacted by swerving to the side-table on his left as a normal driver would have done the collision perhaps would not have ended in the way that it did resulting in the severe injuries to himself and in the death of the driver of the car. Although it is obvious from the evidence that the deceased driver was driving at great speed in order to have caused two fully-loaded tankers to overturn on impact whilst they were travelling along their correct side of the road, there was also, in my view, a duty on the part of the plaintiff to have attempted to ensure safety for himself by taking evasive action by steering his tanker into the side-table on his left away from the path of the oncoming car unless he himself was driving at a speed far greater than 50 to 60 kilometres per hour, the speed at which he said he was travelling just before the collision. In the circumstances of this case I would apportion liability against the deceased driver at 80% and against the plaintiff at 20%.

Now to the question of damages. The plaintiff is 38 years old and, according to the consultant orthopaedic surgeon's report at ABD.7-8, sustained fractures of his second lumbar vertebra resulting in complete paralysis of both lower limbs. He is unable to control his bladder and his bowels and because of the permanent damage to his spinal cord he will have to lead an "assisted wheelchair life" and is likely to suffer from recurrent urinary bladder infections, pressure sores, contracture deformities during the course of his years and inability to fulfil his marital obligations. Several authorities have been submitted to me with regard to the general damages to be awarded. In the case of *Lian Ann Lorry Transport & Forwarding Sdn. Bhd. v. Govindasamy* [1982] CLJ (Rep) 173, RM70,000 was also awarded for paralysis from the waist downwards. In *Teoh Suan Eng v. Lew Meng Shin & Anor* [1982] CLJ (Rep) 810, the sum of RM75,000 was awarded for injuries resulting in fracture of the 1st lumbar vertebra and damage to the spinal cord resulting in paraplegia. In the case of *Abdul Munir bin Hj Abdul Rahman v. Mohamed Adzha bin Hassan* [1985] 2 MLJ cl, RM120,000 was also awarded to the plaintiff on the basis of 100% liability for injuries resulting in fracture of the 4th cervical vertebra causing paralysis of both his lower limbs and loss of good control of the bladder and of 75% of his sexual function. In *Lee Ann v. Mohd. Sahari bin Zakaria* [1986] CLJ (Rep) 432, the sum of RM70,000 was awarded for paralysis from the waist downwards to a female plaintiff of the advanced age of 64 years arising out of fracture of the thoracic vertebra. In the case of *Ng Kah Heng v. Ng Pek Choo* [1989] 2 CLJ (Rep) 170, the plaintiff who was 27 years old at the time of the trial was awarded RM120,000 for pain and suffering and loss of amenities for fracture of the 12th thoracic vertebra with damage to his spinal cord, loss of all protective sensation below the level of the umbilicus, proneness to pressure ulcers to both his feet and over his sacrum and to control of bowel movements.

Having regard to the age of the plaintiff, his paralysis from the waist downwards and the present value of the ringgit I award the sum of RM105,000 as general damages for the plaintiff's pain and suffering and loss of amenities arising out of his injuries on the basis of 100% liability with interest at the rate of 8% per annum from the date of the service of the writ.

As to the claims for the items of special damages not agreed upon, in the absence of any proof of actual expenditure in the form of receipts I would award the sum of RM560 at the rate of RM20 per day for the wife's transport and living expenses for the 28 days she had to reside in Johore Bahru in order to visit the plaintiff at Hospital Sultanah Aminah in Johore Bahru. This sum will bear interest at the rate of 4% per annum from the date of the accident.

Again in the absence of actual proof, I would award the sum of RM400 for her transport expenses for her visits to the plaintiff at Hospital Daerah Banting which is near the kampong where she lived. This sum will also bear interest at the rate of 4% per annum from the date of the accident. The plaintiff chose to purchase an expensive wheelchair when he could have purchased a cheaper one. He has an obligation to mitigate damages and I would allow him the agreed three charges of a standard wheelchair for the lump sum of RM1,600 at the present price of RM520 per chair for the duration of his life. This sum will bear no interest. I think it fair and reasonable to allow him the sum of RM369 as the cost of modifications to his present wheelchair which he has actually incurred. This sum will bear interest at the rate of 4% per annum from the date of the accident. There is also no question that he has to use the urinary condom and the urinary bag to catch the continual flow of urine and I do not think he should be forced to improvise by using substitutes but should be allowed in the interest of proper hygiene to obtain what has been produced in the medical market under proper sanitary conditions. In the absence of proof of their actual cost I would award a sum of RM5,000 to cover the purchases he has made and will have to make in the future of the urinary condoms and bags. This sum will bear no interest.

I now address my mind to the areas of agreement. The plaintiff's future loss of earnings has been agreed at RM65,500 and cost of future nursing care at RM29,500. I accordingly make an award of these respective sums which will bear no interest. The cost of nursing care for the period up to the date of trial has been agreed at RM6,250 which sum I award with interest at the rate of 4% per annum from the date of the accident. As to the loss of past earnings up to the date of trial the sum of RM18,000 has been agreed and I award this with interest at the rate of 4% per annum from the date of the accident. The medical fees at the hospitals and the fees for medical reports and police documents and the search at the RIMV office have been agreed at RM552 which sum I award with interest at 4% per annum from the date of the accident.

The plaintiff shall be entitled to 80% of all the sums awarded and also to the costs of the suit.

Also found at [1991] 3 CLJ 2498